

IN THE SUPREME COURT OF ESWATINI

Case No. 19/2022

In the appeal between:

SANELE LASTLY TFWALA

APPELLANT

and

REX

RESPONDENT

**NEUTRAL CITATION: *Sanele Lastly Tfwala v Rex (19/2022)*
[2023] SZSC 06 (28 February, 2023)**

**CORAM: JUSTICE M. C. B. MAPHALALA, CJ
JUSTICE S.B. MAPHALALA, JA
JUSTICE J. M. VAN DER WALT, JA**

HEARD: 14 February 2023

DELIVERED: 28 February 2023

Summary

Criminal Procedure – Bail – appellant allegedly raped his fifteen year old biological daughter on multiple occasions – appellant charged with rape in contravention of Section 3 (1), 3 (3) (a) (c), 3 (4) (c), 3 (6) (e) as read with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act No 15 of 2018 – such constitute specified incidences of rape as listed in Schedule Five of the Criminal Procedure and Evidence Act No 67 of 1938 – consequently and in terms of section 96(12) of the latter Act appellant burdened with onus to adduce evidence, on a balance of probabilities, proving the existence of exceptional circumstances which, in the interests of justice, entitles appellant to be released on bail

Criminal Procedure – Bail – Appeal against refusal of bail – principle that appellate Court will not interfere in absence of misdirection by Court a quo, restated

Criminal Procedure – Bail – Appeal against refusal of bail – Court satisfied that appellant failed to acquit himself of onus that interests of justice entitles appellant to be released on bail and further, that appellant failed to demonstrate any misdirection by Court a quo

Criminal Procedure – Bail – Likelihood of influencing or intimidating witnesses - welfare of children paramount as commanded in the Constitution of the Kingdom of Swaziland Act, 2005 and echoed in Children's Welfare and Protection Act, No 6 of 2012 - Sexual Offences and Domestic Violence Act, under which the appellant has been charged, also seeks to protect minor children and rape of a minor, for instance, is coupled with substantial custodial sentences upon conviction – High Court Upper Guardian of all minor children within its jurisdiction - decisive factor in casu that there is no satisfactory way of monitoring appellant, should appellant be admitted to bail, in order

to prevent vulnerable child from being exposed to influence or intimidation by her alleged abuser and appeal in the result dismissed

JUDGMENT

Cur adv Vult

(Postea: 28 February 2023)

VAN DER WALT, JA

INTRODUCTION

[1] The appellant applied for bail in the High Court pursuant to being arrested and charged in the Manzini Magistrate's Court with the offences formulated as follows in the rider to the charge sheet:

"COUNT 1

The accused is charged with the crime of Contravening Section 3(1), 3(3) (a) (c), 3(4)(c), 3(6)(e) as read with Section 3(9)(b) of the Sexual Offences and Domestic Violence Act 15/2018.

In that upon the month of June, 2022 at or near Mahlanya area in the Manzini region, the said accused person did unlawfully and intentionally have sexual intercourse several times with one Xoliswa Saneliso Tfwala L/F/J 15 years without her consent and did thereby contravened the said Act.

TAKE NOTE THAT THE RAPE IS ACCOMPANIED BY AGGRAVATING CIRCUMSTANCES AS ENVISAGE BY SECTION 185 bis OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT NO; 67/1938 IN THAT:

1. *The accused person exposed the victim into danger of being infected with sexual infections such as HIV and AIDS by not using a condom when committing the offence.*
2. *The victim was forced into sexual intercourse several times.*
3. *The accused person inflicted physical and mental trauma by having sexual intercourse with the victim.*
4. *The victim was a minor of 15 years at the time of the commission of the offence.*

COUNT 2

The accused person is charged with the offence of Contravening Section 4(1) as read with Section 4(2)(a) of the Sexual Offences and Domestic Violence Act 15/2018.

In that upon or about the month of June 2022 and at or near Mahlanya area in the Manzini Region the said accused person did unlawfully and intentionally engage in the act of sexual penetration of Xoliswa Saneliso Tfwala L/F/J 15 years being his daughter and did thereby contravened the said Act."

[2] The application was opposed by the respondent and a full set of affidavits was filed by the respective parties. Thereafter the matter was argued, culminating in refusal of bail by the Court *a quo*.¹ Dissatisfied with the outcome, the appellant filed a notice

¹ The judgment *a quo* is reported as *Sanele Lastly Tfwala v The King (344/2022) SZHC 197 [14/09/2022]*

of appeal that initially contained 8 (eight) grounds of appeal, of which 4 (four) subsequently were abandoned by way of amendment of the notice. In renumbered form, the grounds were formulated thus:

- "1. *The Court a quo erred in law and in fact by concluding that there was a likelihood that Appellant, if released on bail, would interfere with Crown witnesses, more particularly the complainant, in the face of the Appellant making an undertaking that he would stay elsewhere other than at Mahlanya where complainant resides and not interfere in any way with the crown witnesses.*
2. *The Court a quo erred in fact and in law in preferring the evidence of the Respondent to that of the Appellant without any legal basis for doing so.*
3. *The Court a quo erred in fact in coming to the conclusion that there was a likelihood that Appellant, if released on bail, would abscond trial yet there were no facts and evidence sustaining such a conclusion.*
4. *The Court a quo erred in law and in fact in concluding that Appellant could communicate with complainant through other means in the absence of any evidence and/or basis pointing to that conclusion. His Lordship lost sight of the fact that the Court could impose very strict and restrictive conditions in order to give effect to the right to liberty as underpinned by the presumption of innocence principle."*

[3] At the hearing of the matter, leave was granted to the appellant to amend his notice of appeal accordingly. The Court also granted condonation in respect of the filing of heads of argument and bundles of authorities by both parties, after which the hearing proceeded to the merits.

A SUBMISSIONS BY COUNSEL

A.1 ON BEHALF OF APPELLANT

[4] Before us and during the course of argument, Mr S Jele confined the submissions on behalf of the appellant to two issues, being the likelihood of attempting to evade trial; and the likelihood of influencing, intimidating or interfering with witnesses and/or the evidence.

[5] Mr Jele's submissions, as contained in the appellant's heads of argument and placed before us during argument, can be summarised as follows:

5.1 In respect of absconding trial, it was not disputed that appellant had co-operated with the police during his arrest and questioning. Further, the appellant had undertaken, under oath in his founding affidavit, that he will abide by all bail conditions that may be imposed.

5.2 As regards influencing, intimidation or interference, there was no evidence or allegation that the appellant had threatened the complainant or her biological mother, or had attempted to communicate with either.

[6] The Court was further urged to take the following legal considerations into account:

6.1 **Section 96(1)** of the **Criminal Evidence and Procedure Act**, No 67 of 1938 (as amended) (hereinafter referred to as the “**Criminal Evidence and Procedure Act**”) stipulates that:

“... an accused person who is in custody in respect of any offence shall subject to the provisions of section 95² and the fourth and fifth³ schedules be entitled to be released on bail at any stage preceding the accused’s conviction in respect of such offence unless the court finds that it is in the interests of justice that the accused be detained in custody,”

and this was construed in *Khumalo and Others v The King*⁴ as that:

“ The reading of this section points out that the approach to be adopted by our courts in bail matters is that bail application should not be refused.”

² I.e.. powers of the High Court regarding bail

³ Multiple rape and where the victim is a girl under the age of 16 years, are listed in the fifth schedule under (a)(i) and (b)(i) respectively

⁴ *Marwick Khumalo & 2 Others v The King* (315/2013) [2013] SZHC 194 (4th September 2013) in Paragraph [27]

6.2 **Section 21(2)(a)** of the **Constitution of the Kingdom of Swaziland Act, 2005** dictates that:

*(2) A person who is charged with a criminal offence shall be-
(a) presumed to be innocent until that person is proved or has pleaded guilty."*

6.3 In **Setimela and Another v The State**⁵ it was held that:

"The presumption of innocence is a key plank upon which the granting of bail must be interrogated. The presumption of dignity of every person accused by the State of criminal conduct [sic].⁶ An individual charged with a criminal offence faces grave social and personal consequence including potential loss of physical liberty, subjection to social stigma and ostracism from the community as well as other social, psychological and economic harms..."

6.4 In the ***Khumalo*** case referred to *supra* it was highlighted that the Crown bears the *onus* to demonstrate that the refusal of bail is warranted in the circumstances:

"The language of the section does not merely give to an accused person the right to apply for bail which he has under the Criminal Procedure Act...but the right to be released from detention with or without bail. That right may only be denied an accused person where the interest of justice require otherwise. ... For these reasons I am of the view that accused person does not bear the onus of proving that he

⁵ 2011 BLR 1081 HC

⁶ Words apparently omitted

should be released from detention, but that the State is required to show that he should be refused such bail because the interest of justice require it.”⁷

6.5 In *R v Mark Shongwe*⁸ it was held that:

“If there is no likelihood that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise or hinder the proper course of justice, he will normally be granted bail.”

[7] Premised on all of the above, the ultimate contention on behalf of the appellant was that bail should have been granted in the circumstances of this matter.

A.2 ON BEHALF OF RESPONDENT

[8] Ms N Mhlanga on behalf of the Crown before us and in the respondent’s heads of argument argued to the effect that the facts and circumstances of the case indicate a likelihood of the mischief sought to be avoided, occurring.

⁷ In paragraph [27]; Extract from Magano and Another v District Magistrate, Johannesburg, and Others (1) 1994 (4) SA 169 (W) (1994 (2) SACR 304 (W))

⁸ 1982 SLR 193

[9] The Crown's legal argument commenced with the appropriate criterion on appeal, with reference to *Musa Waga Kunene v Rex*⁹ citing the following extract:¹⁰

*"10. It is a trite principle of our law that bail is a discretionary remedy. Similarly, it is well-settled that an appeal court cannot interfere with a decision of a lower court in the absence of a misdirection by the court in the exercise of its discretionary power to determine bail. Furthermore, an accused bears the onus to show on a balance of probabilities why it is in the interests of justice that he should be released on bail."*¹¹

[10] As regards the likelihood of evading trial and of influencing or intimidation of witnesses, reliance was placed on the following provisions of the **Criminal Procedure and Evidence Act**:

10.1 **Section 96(4)(c) and (d)** read that:

"96. (4) The refusal to grant bail and detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established;

(a)

(b) where there is likelihood that the accused, if released on bail, may attempt to evade the trial;

*(c) where there is likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence..."*¹²

10.2 Following on thereto, **sub-sections 96(6) and (7)** provide:

⁹ (74/2017) [2017] SZHC 52 (13th October 2017)

¹⁰ As per M.C.B. Maphalala CJ, with reference to *Musa Waga Kunene v Rex* (03/2016) [2016] SZSC 26 (30th June 2016) wherein fourth schedule offences were at issue

¹¹ With reference to *Musa Waga Kunene v Rex* (03/2016) [2016] SZSC 26 (30th June 2016)

¹² Abbreviation Court's own

- (6) *In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-*
- (a) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;*
 - (b) the assets held by the accused and where such assets are situated;*
 - (c) the means, and travel documents held by the accused, which may enable the accused to leave the country;*
 - (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;*
 - (e) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Swaziland in an attempt to evade trial;*
 - (f) the nature and the gravity of the charge on which the accused shall be tried;*
 - (g) the strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;*
 - (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;*
 - (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or*
 - (j) any other factor which in the opinion of the court should be taken into account.*
- (7) *In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely-*
- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;*
 - (b) whether the witnesses have already made statements and agreed to testify;*
 - (c) whether the investigation against the accused has already been completed;*
 - (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;*
 - (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;*
 - (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;*
 - (g) the ease with which evidentiary material could be concealed or destroyed;*
or
 - (h) any other factor which in the opinion of the court should be taken into account."*

10.3 **Section 96(12)(a)** stipulates:

"96. (12) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to:-
(a) in the Fifth Schedule the Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permit his or her release."

[11] Further relied on by the Crown were:

11.1 The acceptance into our law of the following extract from

S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat:¹³

*"The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main protecting the investigation and prosecution of the case against hindrance."*¹⁴

11.2 In the matter between *Senzo Matsenjwa and the King*¹⁵ it was unambiguously articulated that:

"[21] A bail hearing is not a trial. Therefore, a bail hearing has nothing to

¹³ 1999 (4) SA 623 (CC) at 641; see for instance 2016 *Kunene* judgment *supra*, Paragraph [14]

¹⁴ Paragraph [14] of the 2016 *Kunene* judgment *supra*

¹⁵ (30/2017) [2018] ZSC 45 (06/11/2018)

do with the guilt or otherwise of an accused person. Put differently, the Crown is not expected to prove the guilt of the accused and the burden of proof does not shift at the bail hearing. As enshrined in our law the accused person is presumed innocent, whether bail is granted or denied, until found guilty at the trial."

[12] Reverting to the matter *in casu*, Ms Mhlanga submitted that lengthy custodial sentences would be imposed should the appellant be convicted on the charges faced by him, ranging between 9 (nine) to 25 (twenty five) years which may encourage absconding trial. Further, that the complainant may find herself in the same place as the appellant when, for instance, going to school or going shopping. There was no satisfactory way of monitoring the appellant, should the appellant be admitted to bail, in order to prevent the complainant from being exposed to influence or intimidation by the appellant.

[13] Matters of bail are decided on a likelihood on the part of the applicant for bail and not actual evidence ¹⁶ and, the argument went, the appellant has failed to adduce evidence that there are exceptional circumstances warranting his release on bail; that the

¹⁶ With reference to the *Mark Shongwe* case *supra*

interests of justice do not favour the granting of bail; and that the Court *a quo* therefore did not misdirect itself.

B ANALYSIS

[14] In considering this matter, the Court is mindful not only of the constitutional and other rights of an accused person, but also mindful of the fact that the welfare of minor children is paramount and that the High Court is the Upper Guardian of all minor children within its jurisdiction.

14.1 **The Constitution in section 29(2) and (3)** thereof commands that
“A child shall not be subjected to abuse or torture or other cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction”
and that *“The child has the right to be properly cared for and brought up by parents or other lawful authority in place of parents.”*

14.2 The Legislator accordingly has devoted 251 pages to these demands in the **Children's Protection and Welfare Act**, No 6 of 2012 which seeks to prevent and punish abuse of children; the Preamble reads: *"AN ACT to extend the provisions of section 29 of the Constitution of the Kingdom of Eswatini Act, 2005 and other international instruments, protocols, standards and rules on the protection and welfare of children, the care, protection and welfare of children; and to provide for matters incidental thereto."* Abuse of a child, in terms of section 48(1) thereof, would attract imprisonment of not less than 5 (five) years.

14.3 The **Sexual Offences and Domestic Violence Act**, under which the appellant has been charged, also seeks to protect minor children and rape of a minor, for instance, is coupled with substantial custodial sentences upon conviction.

[15] The two issues now before us for consideration are the likelihood of attempting to evade trial; and the likelihood of influencing, intimidating or interfering with witnesses and/or the evidence,

which have to be measured against the evidence, read with the inferences by the Court *a quo*.

[16] As regards the issue of evasion the Court *a quo* expressed itself as follows:

“[65] *This leads to the inescapable conclusion that the nature and the gravity of the charges that the Applicant is facing are very serious. This then makes the likelihood of a heavy prison sentence that may be imposed should the Applicant be convicted to be very high; This also has a bearing on the likelihood of the Applicant attempting to evade trial and escaping.*

[66] *In the circumstances, the court cannot ignore and close its eyes on the above considerations which are applicable to the Applicant. The Applicant is charged with very serious offences. His likelihood of evading trial to escape the heavy custodial sentence which is possible upon conviction is very high. Certainly, if the Applicant is convicted he will be exposed to a severe custodial sentence. His release on bail would definitely undermine the criminal justice, system by defeating the objects which Section 96 (12) (a) of the Act was enacted.*”

[17] As regards influencing, intimidation and so forth, the Court *a quo* highlighted *inter alia* the following concerns:

17.1 The appellant refers to his own minor daughter in cold and distant terms as “... the Complainant therefore one Xoliswa Saneliso Tfwala.”

17.2 The appellant, according to his founding affidavit, is intent to continue with his trade of selling liquor at his homestead in Mahlanya area, which is within the same area and vicinity in which the complainant reside. The appellant argued that should his detention be prolonged he will be at risk of losing his customers and also, that his stock is at the verge of being spoiled due to lying idle. It was only in the appellant's replying affidavit, after the Crown had raised the issue of proximity, that the appellant changed tack and stated that he would relocate to the outskirts of Manzini, however, with no further particulars provided.

17.3 Questions then arise as to what could possibly go through the complainant's mind should she bump into her father on her way to school or to the shops, whether she would have confidence in the judicial system and whether she would not be intimidated by his physical presence.

[18] It is settled that the appellant *in casu* bears the onus to establish the requisite exceptional circumstances, on a balance of probabilities with reference to the aforesaid **section 96(12)(a)**. As to what such circumstances would entail, same must mean “*something unique*” or “*one of its kind*” and not merely “*unusual*.”¹⁷

D CONCLUSIONS AND ORDER

[18] On a conspectus of the case as a whole, it is our considered view that:

18.1 The appellant has failed to present adequate and cogent evidence demonstrating some unique feature or features and thus has failed to discharge the onus that the appellant’s release on bail would be in the interests of justice, as is required by **section 96(12)(a)** of the **Criminal Evidence and Procedure Act**;

¹⁷ See *Themba Muzikayifani Mngometulu and Another v Rex (06/2017) [2017] SZSC 37 (10 November 2017)* at Paragraphs [22] and [23]

18.2 The appellant further has failed to demonstrate any misdirection on the part of the Court *a quo* in declining to grant bail. The law and the facts were juxta-posed and weighed by the Court *a quo* in the requisite balanced and judicious manner, in a lengthy and reasoned judgment.


18.3 With reference to section 96(6)(f), a recognised consideration in respect of evasion of trial, is ***“the nature and the gravity of the charge on which the accused shall be tried.”*** The appellant is alleged to be the perpetrator of heinous crimes against the person and psyche of the complainant, who is his fifteen year old biological daughter. It cannot be gainsaid, should the appellant be convicted as charged, that the imposition of lengthy imprisonment is to be expected.

18.4 Not only may the above encourage the appellant to misuse his influence as a father over his child, but of decisive significance and concern to this Court is, should the appellant be admitted to bail, that there is no satisfactory way of monitoring the movements and actions appellant in order to prevent a vulnerable

child from being exposed to influence or intimation by her
alleged abuser.


[19] Accordingly, the following Order is made:

The appellant's appeal is dismissed.



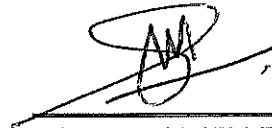
J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree



M.C.B MAPHALALA
CHIEF JUSTICE

I agree



S.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant: Mr S Jele of Phakathi Jele Attorneys

For the Respondent: Crown Counsel Ms N Mhlanga of the Chambers
of The Director of Public Prosecutions